FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TWITTER, INC., *Plaintiff-Appellant*, v. KEN PAXTON, in his official capacity as Attorney General of Texas, *Defendant-Appellee*.	No. 21-15869 D.C. No. 3:21-cv-01644-MMC ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted January 10, 2022
San Francisco, California

Filed March 2, 2022
Amended December 14, 2022

Before: Mark J. Bennett, Ryan D. Nelson, and Patrick J. Bumatay, Circuit Judges.

Order;
Opinion by Judge R. Nelson

SUMMARY*

Civil Rights

The panel amended its opinion filed March 2, 2022; denied a petition for panel rehearing; and denied a petition for rehearing en banc on behalf of the court in an action brought by Twitter against Ken Paxton, the Attorney General of Texas, in his official capacity, alleging First Amendment retaliation.

After the events at the U.S. Capitol on January 6, 2021, Twitter banned President Donald Trump for life. Soon after Twitter announced the ban, the Texas Office of the Attorney General (OAG) served Twitter with a Civil Investigative Demand (CID) asking it to produce various documents relating to its content moderation decisions. Twitter sued Paxton, in his official capacity, in the Northern District of California, arguing that the CID was government retaliation for speech protected by the First Amendment. Twitter asked the district court to enjoin Paxton from enforcing the CID and from continuing his investigation, and to declare the investigation unconstitutional. The district court dismissed the case as not ripe. On March 2, 2022, the panel issued an opinion affirming the district court and holding that Twitter's claims were not prudentially ripe. On reconsideration, the panel in this amended opinion affirmed the district court on the grounds that Twitter's claims were not constitutionally ripe.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that Twitter is not really making a pre-enforcement challenge to a speech regulation; Twitter does not allege that its speech is being chilled by a statute of general and prospective applicability that may be enforced against it. Rather, Twitter alleges that OAG targeted it specifically with the CID and related investigation. And the subject of its challenge is not only some anticipated future enforcement action by OAG; Twitter claims OAG has already acted against it. The panel therefore concluded that a retaliatory framework rather than a pre-enforcement challenge inquiry was appropriate to evaluate Twitter's standing.

The panel held that Twitter's allegations were not enough to establish constitutional standing and ripeness because Twitter failed to allege any chilling effect on its speech or any other legally cognizable injury that the requested injunction would redress. Twitter's claim that its ability to freely make content decisions "was impeded" was vague and referred only to a general possibility of retaliation. It was not a claim about the chilling effect of the specific investigation at hand. And Twitter's naked assertion that its speech has been chilled is a bare legal conclusion upon which it cannot rely to assert injury-in-fact. Nor did Twitter's other allegations meet the concreteness and particularity standards that Article III requires. Finally, Twitter had not suffered any Article III injury because the CID is not self-enforcing. Pre-enforcement, Twitter never faced any penalties for its refusal to comply with the CID. And enforcement is no rubber stamp: If OAG seeks to enforce the CID, it must serve the recipient with the petition, the state court can conduct hearings to determine whether to order enforcement, and the recipient may appeal to the Texas Supreme Court.

COUNSEL

Peter G. Neiman (argued), Alex W. Miller, and Rishita Apsani, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York; Patrick J. Carome, Ari Holtzblatt, Anuradha Sivaram, and Susan Pelletier, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.; Mark D. Flanagan, Wilmer Cutler Pickering Hale and Dorr LLP; Palo Alto, California; for Plaintiff-Appellant.

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ORDER

The opinion filed March 2, 2022, and appearing at 26 F.4th 1119, is amended by the opinion filed concurrently with this order.

The full court has been advised of the petition for rehearing en banc, filed March 30, 2022, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. With these amendments, the panel unanimously votes to DENY the petition for panel rehearing and rehearing en banc.

OPINION

R. NELSON, Circuit Judge:

After the events at the U.S. Capitol on January 6, 2021, Twitter banned President Donald Trump for life. Soon after Twitter announced the ban, the Texas Office of the Attorney General (OAG) served Twitter with a Civil Investigative Demand (CID) asking it to produce various documents relating to its content moderation decisions. Twitter sued Ken Paxton, the Attorney General of Texas, in his official capacity, arguing that the CID was government retaliation

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